

**This opinion is not intended for publication**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 02-20613
	)	
E. KENNETH KOOS and	)	Chapter 13
BRENDA H. KOOS,	)	
Debtors.	)	Judge Arthur I. Harris

MEMORANDUM OF OPINION

This matter is before the Court on the motion of E. Kenneth Koos and Brenda H. Koos (Debtors) for a stay pending appeal of this Court's Order entered December 26, 2002, (Docket #23) granting the Motion for Relief from Stay filed by Carol and Michael Baglia (Docket #18). The Court heard oral argument on the Baglias' motion on December 19, 2002. After the Court issued its ruling, Debtors timely appealed such ruling on January 6, 2003. For the reasons that follow, the Kooses' motion for a stay pending appeal of the Court's December 26, 2002, order is denied.

Under Bankruptcy Rule 8005, the factors to be considered by a court in determining whether a stay or injunction pending appeal should issue are:

- (1) whether the applicant has demonstrated a likelihood of success on the merits;
- (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other interested parties; and
- (4) where the public interest lies. *See Michigan Coalition of Radioactive Material*

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*Users, Inc. v. Griepentrog*, 954 F.2d 150, 153 (6th Cir. 1991); *In re Dow Corning*, 255 B.R. 445, 542 (E.D. Mich. 2000); *In re Best Reception Systems, Inc.*, 219 B.R. 988, 992-93 (Bankr. E.D. Tenn. 1998) (applying Rule 8005 and *Griepentrog* standard); *In re Abbo*, 191 B.R. 680, 682 (Bankr. N.D. Ohio 1996) (Krasniewski, J.) (same).

In order to succeed on appeal, the Kooses would have to establish that this Court abused its discretion in granting relief from stay under Section 362(d). *See In re Laguna Associates Limited Partnership*, 30 F.3d 734, 737 (6th Cir. 1994) ("This Court reviews a bankruptcy court's order granting or denying relief from an automatic stay only for abuse of discretion."); *In re White*, 851 F.2d 170, 174 (6th Cir. 1988) (finding no abuse of discretion where bankruptcy court lifted stay to permit divorce action to proceed in state court). A bankruptcy court may lift the automatic stay "for cause." 11 U.S.C. § 362(d)(1). Because the Code provides no definition of what constitutes "cause" under § 362(d), courts must determine whether discretionary relief is appropriate on a case-by-case basis. *See In re Trident Associates Limited Partnership*, 52 F.3d 127, 131 (6th Cir. 1995) (holding that a bankruptcy court must consider the "totality of the circumstances" when deciding to lift the automatic stay for cause); *In re Laguna Associates*, 30 F.3d at 737.

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In deciding whether to lift the automatic stay, courts consider a number of factors including:

(1) whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court.

*In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992). *Accord In re Revco D.S., Inc.*, 99 B.R. 768, 776-77 (Bankr. N.D.Ohio 1989) (lifting stay to allow previously filed state action to continue to judgment but not execution of judgment).

In light of the equitable nature of the Court's underlying decision to grant relief from stay under § 362(d), any analysis of the Kooses' likelihood of success on appeal essentially involves a similar balancing of equities. Therefore, the Court has merged its analysis under *Griepentrog* with the equitable balancing required under § 362(d). In concluding that the equities in this case do not justify a stay pending appeal, the Court has considered a number of factors,<sup>1</sup> including the following.

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<sup>1</sup> See *In re Cummings*, 221 B.R. 814, 818 (Bankr. N.D. Ala. 1998) (identifying ten different factors for balancing the equities under § 362(d)).

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First, the Court notes that the order granting relief from stay expressly provided that "Movants may proceed to judgment only. Movants may not execute on state judgment, if any, entered in their favor." Thus, the only potential harm to the Kooses would stem from the time and expense of defending the state court proceeding.

Second, the current state court proceeding is far into the course of litigation. After extensive discovery and briefing, the case is evidently very close to trial. Considerations of judicial economy would dictate that the case be concluded in the state court and then returned to this court for possible execution on a judgment. This Court is not unmindful of the time and expenditure of resources that would be required of this Court to determine, absent a state court judgment, the amount of the Baglias' claims against the Kooses and the Kooses' counterclaims against the Baglias.

Third, the Kooses' Chapter 13 case, as the Baglias allege, may not have been filed in good faith. For example, the Kooses' Chapter 13 plan proposes to pay a mere \$100 per month for 36 months, despite scheduled debts in excess of \$689,000 and an apparent arrearage on their first mortgage of over \$23,000. The feasibility of this plan may become an issue at some point.

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Fourth, even accepting the Kooses' argument that the costs of defending the state court litigation are so burdensome so as to necessitate their bankruptcy filing, they conceivably have the option of allowing a default judgment to be entered against them because any such judgment, regardless of amount, would presumably be dischargeable in a Chapter 13 case under 11 U.S.C. § 1328.

Accordingly, the Kooses' motion for a stay pending appeal is denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris      01/17/2003  
Arthur I. Harris  
United States Bankruptcy Judge